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No. 84-447 (2)

IN THE

Supreme Court of the United States

October Term, 1984

METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY,

Petitioner,

vs.

EARL M. LONGENECKER, MARY JANE LONGENECKER, WILLIAM E. BAKER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY,

Respondents.

TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AT NO. 81-2867.

BRIEF OPPOSING WRIT OF CERTIORARI

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Questions Presented

I. Did the Third Circuit Court of Appeals properly apply the appropriate standard of review in affirming the District Court's finding that there was no case or controversy in relation to Petitioner's request for declaratory relief?

II. Does a case or controversy exist between Petitioner, an uninsured motorist insurance carrier, and Respondents, automobile liability insurance carriers, to determine coverage questions when the Petitioner has not paid the insured and it is uncertain whether such payment will have to be made?

TABLE OF CONTENTS.

	Page
Questions Presented	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Constitutional Provision Involved	3
Reasons for Denying Writ	4
Statement of the Case	5
Summary of Argument	7
I. The Third Circuit Court of Appeals properly applied the appropriate standard of review in affirming the District Court's dismissal of Petitioner's Petition for Declaratory Relief	7
II. No case or controversy exists between the parties	10
Conclusion	17
Appendix:	
Order Dated June 14, 1982	1a
Memorandum Opinion Dated February 7, 1983	3a
Memorandum and Order Dated October 7, 1983	10a
Memorandum Opinion of the Court Dated June 18, 1984	16a
American Motorists Insurance Company and State Farm Mutual Automobile Insurance Company's Memorandum of Law	19a

Page

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American Fidelity & Casualty Co. v. Pennsylvania Threshermen and Farmers Mutual Casualty Insurance Co., 280 F.2d 453 (5th Cir. 1960) 16
Brillhart v. Excess Insurance Co., 316 U.S. 491 (1942) 11
Brown & Root, Inc. v. Big Rock Corp., 383 F.2d 662 (5th Cir. 1967) 16
Doe v. Gallinot, 657 F.2d 1017 (9th Cir. 1981) 7
Government Employees Insurance Co. v. Keystone Insurance Co., 408 F.Supp. 1185 (E.D. Pa. 1975) .. 11
Gulf Insurance Co. v. American Arbitration Association, 311 F.Supp. 989 (E.D. Pa. 1970) 11
Johnson v. Interstate Transit Lines, 163 F.2d 125 (10th Cir. 1947) 16
Lumberman's Mutual Casualty Co. v. Borden Co., 241 F.Supp. 683 (S.D.N.Y. 1965) 12
M & M Transportation Co. v. U.S. Industries, Inc., 416 F.Supp. 865 (S.D.N.Y. 1976) 15,16
Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941) 15
Metropolitan Property & Liability Insurance Co. v. Earl M. Longenecker, et al., No. 81-2867 (E.D. Pa. Oct. 7, 1983), *aff'd*, No. 83-1819 (3d Cir. 1984) 7,8,10,13,15
Mielcuszny v. Rosol, 317 Pa. 91, 176 A. 236 (1934) 8
Nationwide Mutual Insurance Co. v. Megill et ux., 449 F.Supp. 1200 (E.D. Pa. 1978) 11,12
Public Service Commission et al. v. Wycoff Co., 344 U.S. 237 (1952) 10,11,13
State Farm Mutual Insurance Co. v. Shour, 407 F.Supp. 787 (E.D. Pa. 1975) 11

Page

Travelers Insurance Co. v. Davis, 490 F.2d 536 (3d Cir. 1974) 11
Walls v. City of Pittsburgh, 292 Pa. Super. 18, 436 A.2d 698 (1981) 14

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U.S. CONST. art. III, Sec. 2, cl. 1 3,10
Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 2d §2759 (1983) 7

IN THE

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No. 84-447

METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY,

Petitioner,

vs.

EARL M. LONGENECKER, MARY JANE LONGENECKER, WILLIAM E. BAKER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY,

Respondents.

TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AT NO. 81-2867.

BRIEF OPPOSING WRIT OF CERTIORARI

Opinions Below

The Order and Opinion of the Court of Appeals affirming the District Court's dismissal of the Petitioner's Petition for Declaratory Judgment (App. 16a) is not reported. The Order and Opinion of the United States District Court dismissing the Petition for Declaratory Judgment (App. 10a) is not reported.

Jurisdiction

In accordance with 28 U.S.C. §1254(1), the jurisdiction of the Court is invoked to review upon issuance of a Writ of Certiorari the Third Circuit Court of Appeals' affirmance on June 18, 1984, of the District Court's dismissal of the Petition for Declaratory Judgment by Metropolitan Property & Liability Insurance Company.

Constitutional Provision Involved

"The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of Admiralty and Maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

U.S. CONST. art. III, Sec. 2, cl. 1.

Reasons for Denying Writ

The Third Circuit Court of Appeals has rendered a decision in conformity with the decisions of other Federal Courts of Appeals by dismissing an action that fails to present a case or controversy. Additionally, the Appellate Court followed the accepted and usual course of judicial proceedings by properly applying the appropriate standard of review in affirming the District Court's dismissal of the Petition for Declaratory Relief. Therefore, this Court need not exercise its discretionary power of review under a Writ of Certiorari to ensure uniformity of the law among the various Federal Appellate Courts.

Statement of the Case

This action arises from a Complaint for Declaratory Judgment in which the Petitioner, Metropolitan Property & Liability Insurance Company (hereinafter "Metropolitan"), sought an adjudication as to its rights and obligations under a policy of insurance which Metropolitan issued to Earl and Mary Jane Longenecker. Specifically, the Petitioner sought a declaration from the Court that it is not legally obligated to provide uninsured motorist benefits to the Longeneckers because the alleged uninsured tortfeasor, William E. Baker, is entitled to coverage under either a policy of automobile liability insurance issued by the Respondent, State Farm Mutual Automobile Insurance Company (hereinafter "State Farm"), or under a policy of automobile liability insurance issued by Respondent, American Motorist Insurance Company (hereinafter "American"). Both carriers have denied coverage to Mr. Baker. Metropolitan had made no payments to the Longeneckers relative to their uninsured motorist claim.

On June 14, 1982, the Lower Court granted Respondents' (State Farm and American) Motion for Summary Judgment, per Order of the Hon. Louis C. Bechtle at No. 81-2867 (App. 1a.) Thereafter, Petitioner appealed, the matter being listed as No. 82-1427 with the Court.

Oral argument was heard on January 11, 1983, by Circuit Judges Weis, Sloviter and Becker and, on February 7, 1983, per Memorandum Opinion by Judge Weis (App. 3a), this matter was remanded to the Lower Court "for further proceedings consistent with this Opinion", to wit:

1. the indispensability of one or more of the parties; and

2. justiciability or "ripeness".

As a result of the Memorandum Opinion, an Order was issued on February 14, 1983, by the Lower Court directing the submission of legal memoranda addressing the issues suggested in the Appellate Court's Memorandum Opinion.

On September 27, 1983, a Hearing was held in the lower Court and, subsequent thereto, on October 7, 1983, the Lower Court issued a Memorandum and Order (App. 10a) dismissing the action as not justiciable. Thereafter, Petitioner appealed.

Oral argument was heard on June 11, 1984, by Circuit Judges Weis and Becker and District Judge Oliver. On June 18, 1984, by Memorandum Opinion (App. 16a) from Judge Weis, this dismissal was affirmed.

SUMMARY OF ARGUMENT

I. The Third Circuit Court of Appeals properly applied the appropriate standard of review in affirming the District Court's dismissal of Petitioner's Petition for Declaratory Relief.

As stated in the brief of State Farm and American in the Court below, discretion to implement or dismiss a declaratory remedy is subject to a more certain review then an "abuse of discretion" standard and, while not expressly adopted, the usual practice on appeal is for the appellate court to substitute its own judgment for that of the trial court. *Doe v. Gallinot*, 657 F.2d 1017 (9th Cir. 1981); Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 2d §2759 (1983). Admittedly, the Court below stated, "in view of the circumstances in this case, which we have twice reviewed, we find no abuse of discretion in the District Court's decision to withhold the Declaratory Relief at this time." *Metropolitan Property & Liability Ins. Co. v. Earl M. Longenecker, et al.*, No. 83-1819 (3d Cir. 1984). App. 18a. Respondents admit that the choice of words employed by the Appellate Court may have been unfortunate, to wit, "abuse of discretion". Nevertheless, a careful review of the entire Opinion of the Appellate Court indicates that the Appellate Court did in fact reach the merits of the Trial Court's dismissal of Declaratory Relief and did substitute its judgment for that of the Trial Court. For example:

> Judge Bechtle referred to ambiguous scenarios which are lurking in the background and which may some day mature into a real dispute. *His doubt as to the advisability of granting Declaratory Relief at this stage of the events is quite understandable.* (Emphasis added.)

Metropolitan Property & Liability Ins. Co. v. Earl M. Longenecker, et al., No. 83-1819 (3d Cir. 1984). *See* App. 18a. At the very least, the Appellate Court impliedly accepted and applied the "substitution of discretion" standard.

However, assuming the Appellate Court applied the "abuse of discretion" standard, as contended by the Petitioner, its application of that standard was not erroneous since, as stated above, the "substitution of discretion" standard has not been expressly adopted. Furthermore, if the "abuse of discretion" standard was applied, it was done properly. "An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or illwill, as shown by the evidence or the record, discretion is abused." *Mielcuszny v. Rosol*, 317 Pa. 91, 93-94, 176 A.236, 237 (1934). Since the Appellate Court stated that "[the Lower Court's] doubt as to the advisability of granting declaratory relief at the stage of the events is quite understandable," it is apparent that the Appellate Court did not find the Lower Court's decision a misapplication of the law or manifestly unreasonable or prejudicial and thereby an "abuse of discretion".

As stated above, Petitioner contends that if the "abuse of discretion" standard is the appropriate standard of review, the Appellate Court erroneously applied this standard. However, Petitioner, in support of its contention, fails to address this matter and instead argues the merits of its case, citing the conservation of judicial resources and judicial economy as support for quick resolution of this matter. Additionally, Petitioner fails to mention that if it did not pursue this declaratory

action, the Longeneckers' uninsured and underinsured motorist claims would have been settled long ago either by common law arbitration (as provided in the insurance contract) or compromise.

Petitioner's submission "that a judgment by the Court declaring the respective liabilities of State Farm and American Motorist will ... bring about a quick resolution" is unfounded. If this Court grants declaratory relief, all carriers in the instant situation will delay payments to injured insureds by seeking a declaratory adjudication prior to making payments. This behavior, in turn, will force insureds to protect their rights by filing for uninsured motorist benefits, commencing a tort action against the uninsured motorist and, thereafter, awaiting the outcome of the declaratory judgment action to determine which course to pursue. Additionally, and with all due respect, a panel of arbitrators, appointed under the uninsured motorist provisions, as set forth contractually between the parties, is not bound by any judicial ruling as to insured's versus uninsured's coverage. Therefore, this Court's decision will not resolve the entire matter. In fact, Petitioner's assertions relative to "judicial economy" are little more than illusory.

Accordingly, this Court need not exercise its supervisory powers under a Writ of Certiorari since the Third Circuit Court of Appeals followed the accepted and usual course of judicial proceedings by properly affirming the District Court's dismissal.

II. No case or controversy exists between the parties.

Article III of the Constitution of the United States provides, in part, that the "judicial power" shall extend to all cases and controversies. U.S. CONST. art. III, Sec. 2, cl.1. Implicit in the "case or controversy" requirement of Article III is the issue of "ripeness".

> "If there is no actual case or controversy, then the matter at hand is not justiciable and the Court has no power to grant declaratory relief. A justiciable controversy is to be distinguished from a dispute of a hypothetical or abstract character or one which is merely academic or moot. *The difference is necessarily one of degree.* The basic question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having 'adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" (Citations omitted; emphasis added.)

Metropolitan Property & Liability Ins. Co. v. Earl M. Longenecker, et al., No. 81-2867 (E.D.Pa. Oct 7, 1983), *aff'd*, No. 83-1819 (3d Cir. 1984). App. at 12a-13a.

The Lower Court, in holding that Metropolitan's request for relief was "premature" and therefore not justiciable, stated that, "Metropolitan's conceptual view of its rights to demand a declaration of its rights does not satisfy this Court's constitutional mandate to address itself to actual cases or controversies and not to ambiguous scenarios which are lurking in the background and which may someday mature into a real dispute." *Id.* App. at 13a-14a.

It is well settled that whether to grant the declaratory judgment in a particular case is a matter within the Court's sound discretion. *See Public Service Commission*

et al. v. Wycoff Co., 344 U.S. 237 (1952); *Brillhart v. Excess Insurance Co.*, 316 U.S. 491 (1942) and *Nationwide Mutual Ins. Co. v. Megill et ux.*, 449 F.Supp. 1200 (E.D. Pa. 1978). The instant question, dealing with declaratory relief in uninsured motorist coverage areas is not a novel issue:

> "This Court has on at least two occasions considered the question of a declaratory judgment concerning the interpretation of an uninsured motorist coverage provision in a motor vehicle liability policy containing the above quoted arbitration clauses.[1] *Government Employees Insurance Company v. Keystone Insurance Co.*, 408 F.Supp. 1185 (E.D.Pa. 1975); *State Farm Mutual Insurance Co. v. Shour*, 407 F.Supp. 787 (E.D.Pa. 1975). In these cases, we accepted the guidance of our learned colleague, Judge Luongo, in *Gulf Insurance Company v. American Arbitration Association*, 311 F.Supp. 989 (E.D.Pa. 1970), which was approved by the Third Circuit in *Travelers Insurance Co. v. Davis*, 490 F.2d 536 (3d Cir. 1974) .... In *Travelers*, the Third Circuit affirmed the District Court's dismissal of the insurance company's declaratory judgment action on the grounds that under Pennsylvania law all questions of coverage and recovery were within the jurisdiction of the arbitrator as provided in the arbitration clause of the uninsured motorist provision."

---

[1] "If we and the insured do not agree about the insured's right to recover damages or the amount of damages, the following arbitration procedure will be used:

> After written demand for Arbitration by either party, each party will select a competent and disinterested arbitrator. The two so selected will select a third. If selection of the third arbitrator cannot be agreed upon within thirty days, the insured or the company may request that selection be made by a judge of the court of record in the county and state in which arbitration is pending . . ."

Megill, Supra at 1202.

Megill, Supra at 1202-3. From *Megill* and the authorities cited therein, it is readily apparent that the courts have been reluctant to grant declaratory relief under the instant circumstances.

Petitioner asserts that declaratory relief may be proper when "contingent" liability appears. *See* Petitioner's Petition at p. 13. In support thereof, Petitioner cites *Lumberman's Mutual Casualty Co. v. Borden Co.*, 241 F. Supp. 683 (S.D.N.Y. 1965). *Lumberman's* dealt with several insurors and one insured relative to coverage issues as between those insurors and *their* insured. Apparently, all insurors were in privity with the insured and the request for declaratory relief resulted from an incident, the consequences of which one of the insurors had contractually agreed to defend and indemnify against. In the instant action, all of the insurors are contractually bound to different parties, although, as a result of the circumstances, the interests of American and State Farm are relatively identical, albeit opposite those of the Petitioner, Metropolitan. Therefore, at the very least, it is submitted that the Petitioner has no standing, in and of itself, to maintain the declaratory judgment action at the present time. Petitioner's only potential right to declaratory relief might arise when, as the Appellate Court suggested in its Opinion dated February 7, 1983 in the instant action (App. 3a), William E. Baker is realigned as a Plaintiff since his interests are adverse to State Farm and American and identical to Metropolitan. (Baker's interests are identical to those of Metropolitan since he would seek to eliminate any risk of personal liability by having State Farm and/or American extend coverage. His interests are adverse to those of State Farm and American since both carriers have denied him coverage. *See* American Motorist Company and State Farm Mutual Insurance

Company's Memorandum of Law, *Metropolitan* No. 81-2867, *supra* at App. 19a). However, in the event that Baker is *realigned*, then diversity jurisdiction would be destroyed and the case subject to dismissal since Baker and the Longeneckers are all Pennsylvania residents.

Curiously, immediately preceding Petitioner's argument relative to "contingent" liability, Petitioner asserts and Respondents concur that:

> To be 'ripe for determination' under the Declaratory Judgment Act, a "*disagreement must not be nebulous or contingent but must have taken on fixed and final shape* so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries and some useful purpose to be achieved in deciding them." *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 244 (1952). (Emphasis added.)

Petitioner's Petition at pp. 10-11. Using Petitioner's authority as set forth above, the following analysis is dispositive. It is uncontroverted that:

> (1) counsel for Metropolitan indicated at the September 27, 1983, hearing before the Lower Court that Metropolitan was still in the stage of casual correspondence with its insured, prompting the Court to note that, "the liability dispute between Metropolitan and the Longeneckers *has not even developed to the level of actual negotiation.*" *Metropolitan*, No. 81-2867, *supra* at p. 4 of App. 13a. (Emphasis added.);
>
> (2) the Longeneckers have commenced a state court action against the alleged tortfeasor, Baker, which has not proceeded to judgment nor to assessment of damages; and
>
> (3) relative to an accident which occurred on October 5, 1980, and due, in part, to Metropolitan's commencement of this action, the Longeneckers

> have received no *uninsured motorist benefits nor any other benefits*, excepting, presumably, Pennsylvania No-Fault Personal Injury Protection benefits.

With the above facts in mind, even if the Longeneckers demanded uninsured motorist benefits through arbitration, they may nor may not prevail at said arbitration. In the event the Longeneckers prevail, then, and only then will Metropolitan's subrogation interests arise, but if, and only if, the sum of the Longeneckers' recovery from Metropolitan *plus* from the alleged tortfeasor, Baker (assuming a successful subrogation action), *exceeds* the Longeneckers' loss and is so proven *by Metropolitan. See Walls v. City of Pittsburgh*, 292 Pa. Super. 18, 436 A.2d 698 (1981). Therefore, the Court's ruling on the issue would be advisory if the Longeneckers do not prevail at uninsured motorist arbitration.

Although Petitioner argues that the Longeneckers would, arguably, prevail, Petitioner supplied the Lower Court no demonstrable evidence of a sufficiently ripe case or controversy in this case. Petitioner states:

> The Longeneckers have already brought suit against William Baker and have made a demand for Uninsured Motorist Arbitration. The Respondent insurance carriers have refused to defend William Baker. Thus, it is clear that there is a sufficient controversy which is ripe for relief.

Petitioner's Petition at p. 10.

Respondents, State Farm and American, admit the *facts* set forth above but respectfully submit that the conclusion drawn from those facts by Petitioner, to wit, "a sufficient controversy . . ." does not logically follow. The Longeneckers requested Uninsured Motorist

Arbitration over two years ago. However, as of this date, neither they nor the Petitioner have pursued this course of action beyond a mere request. Instead, the Petitioner would have the Court determine whether either of the Respondent carriers owed coverage to the tortfeasor and, assuming *arguendo* that the Court decided this issue, then either one of the three carriers would be forced to pay certain sums (to be established in the future) if and when the Longeneckers pursue their claim. The Lower Court determined that the establishment of "certain sums" (to be established in the future) if and when the Longeneckers pursue their claim, " 'simply did not rise to the realm of sufficient immediacy and reality to warrant the issuance of a declaratory judgment'." *Metropolitan Property & Liability Insurance Co. v. Earl M. Longenecker, et al.*, No. 81-2867, *supra*, quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

Additionally, Petitioner has not suggested how similar matters would be resolved where the immediacy of the uninsured motorist action is not "certain" or where the liability question is not so "clear". Nor has Petitioner suggested a remedy for the inordinate delay occasioned by the commencement of similar declaratory relief actions where insured victims of uninsured tortfeasors await the outcome of complex litigation commenced by their own insurance carrier.

In *M&M Transportation Co. v. U.S. Industries, Inc.*, 416 F.Supp. 865 (S.D.N.Y. 1976), the Court stated:

> "However troublesome the concept of justiciability may be in its application to some cases, the prematurity of the issue presented in the instant action is clear enough. In essence, the Court

> is herein asked to declare the parties' rights to an "asset" that does not presently exist and whose future existence is not a certainty. To be sure, Plaintiff may be pregnant with confidence that the subject refund eventually will be allowed. That condition, however, is not enough to permit, in effect, a decree of custody over what is now no more than an expectancy that might never be realized. This Court cannot ignore the often-recited admonition that "it is not the function of a United States District Court to sit in judgment on these nice and intriguing questions which today may readily be imagined, but never in fact come to pass." *American Fidelity & Casualty Co. v. Pennsylvania Threshermen and Farmers Mutual Casualty Insurance Co.*, 280 F.2d 453, 461 (5th Cir. 1960). *Cf. Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662, 665-66 (5th Cir. 1967); *Johnson v. Interstate Transit Lines*, 163 F.2d 125, 128-29 (10th Cir. 1947). (Footnote omitted.)

M&M Transportation Co., supra at 870. It is respectfully submitted that Petitioner's cause may be similarly characterized and, therefore, was properly dismissed by the Court below.

Conclusion

The Respondents respectfully request the Court to deny Metropolitan Property & Liability Insurance Company's Petition for a Writ of Certiorari because the Appellate Court followed the accepted and usual course of judicial proceedings by properly applying the appropriate standard of review and conformed with other Federal Appellate and District Courts by affirming the dismissal of Metropolitan's Petition for Declaratory Relief which fails to state a case or controversy.

Respectfully submitted,

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APPENDIX

Order Dated June 14, 1982.

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Pennsylvania

METROPOLITAN PROPERTY AND LIABILITY INSURANCE CO.,

v.

EARL M. LONGENECKER and MARY JANE LONGENECKER and WILLIAM E. BAKER and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY.

Civil Action No. 81-2867

ORDER

AND NOW, TO WIT, this 14th day of June, 1982, upon consideration of the motion of defendants American Motorists Insurance Co., which has been joined in by defendants State Farm Mutual Automobile Insurance Co., Earl M. Longenecker and Mary Jane Longenecker, and also upon consideration of plaintiff's memorandum of law in answer to defendants' motion and plaintiff's reply memorandum, IT IS [illegible]ERED as follows:

Appendix—Order Dated June 14, 1982.

1. Defendants' motion for summary judgment is *granted* on the ground that disputed issues of fact like those involved here must be resolved by arbitration; *Grange Mutual Casualty Co. v. Pennsylvania Manufacturers' Association Insurance Co.*, 438 Pa. 95, 263 A.2d 732 (1970); *National Grange Mutual Insurance Co. v. Kuhn*, 428 Pa. 179, 236 A.2d 758 (1968);

2. Judgment is *entered* in favor of defendants Earl M. Longenecker, Mary Jane Longenecker, William E. Baker, State Farm Mutual Automobile Insurance Company and American Motorists Insurance Company, and against plaintiff Metropolitan Property and Liability Insurance Company.

LOUIS C. BECHTLE, *J.*

Memorandum Opinion Dated February 7, 1983.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 82-1427

METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY,

Appellant,

v.

EARL M. LONGENECKER, MARY JANE LONGENECKER, WILLIAM E. BAKER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY,

Appellees.

Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civil No. 81-2867)

Argued January 11, 1983
Before: WEIS, SLOVITER and BECKER,
Circuit Judges.
(Opinion filed February 7, 1983)

Appendix—Memorandum Opinion Dated February 7, 1983.

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MEMORANDUM OPINION

Appendix—Memorandum Opinion Dated February 7, 1983.

WEIS, *Circuit Judge.*

In this diversity case, the plaintiff, Metropolitan Property and Liability Insurance Company, seeks a declaratory judgment establishing whether automobile liability insurance coverage was in effect for William E. Baker on October 5, 1980. On that day, Baker was driving an automobile that collided with one operated by Earl Longenecker. As result of the accident, Earl and his wife, Mary Jane, sustained personal injuries.

The plaintiff's policy provided uninsured motorist coverage for the Longeneckers. According to the Longeneckers' brief,[1] their policy defines an uninsured motor vehicle as one whose liability insurance carrier "denies coverage." The Metropolitan policy also states that "[i]f we and any person do not agree about that person's right to recover damages, or the amount of damages," the dispute is to be arbitrated. The State Farm Mutual Automobile Insurance Company and the American Motorists Insurance Company have both formally denied coverage on the automobile Baker was driving at the time of the accident.

Metropolitan's complaint listed Baker, the Longeneckers, State Farm, and American Motorists as defendants. Baker and the Longeneckers are citizens of Pennsylvania, and the three insurance companies are citizens of different states. Thus, as filed, the complaint states the complete diversity required for jurisdiction.

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[1] Even though the plaintiff seeks a declaration of its obligations under its own policy, it did not attach a copy of the policy to its complaint. That deficiency should be corrected on remand.

Metropolitan asked the court to declare that State Farm and American Motorists offered coverage to Baker, that Metropolitan's uninsured motorist coverage is not applicable, and that the Longeneckers be prohibited from pursuing any action against Metropolitan until the respective coverage questions are resolved. The district court granted summary judgment for the defendants on the ground that state law requires disputed issues of fact, like those present in this case, to be resolved by arbitration. The court did not discuss the fact that the arbitration clause applies only as between the Longeneckers and the Metropolitan, and not to the other two insurance companies.[2]

We do not pass on the merits of the district court's decision because we are met by jurisdictional problems at the outset. In determining whether diversity jurisdiction exists, the plaintiff's designation of parties as defendants is not binding, and the court may realign them to conform with their actual interests. The test is whether the parties with the same ultimate interests are on the same side. *See* 13 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §3607, at 641 (1975).

Metropolitan seeks to relieve itself from liability under its uninsured motorist clauses by establishing that Baker was covered by either or both State Farm and American

[2] The parties have cited the case of Grange Mutual Casualty Co. v. Pennsylvania Manufacturers' Association Insurance Co., 438 Pa. 95, 263 A.2d 732 (1970), as authoritative Pennsylvania law on the issue of arbitration. We point out once again that an opinion, as in that case, joined in by less than a majority of the court has no precedential value. *See* Vargus v. Pitman Manufacturing Co., 675 F.2d 73 (3d Cir. 1982).

Motorists. The latter two insurance companies are therefore properly listed as defendants. But, by trying to establish coverage for Baker, Metropolitan is directly serving his interest, or at least it would appear so as we read the record at this point. Consequently, it would seem that Baker should properly be designated as a plaintiff.

Just where the Longeneckers' interest lies is not apparent from the record. They have instituted a tort claim in the state court against Baker, and, in that context, seemingly would be benefited by a finding that the defendant companies did insure him. All, however, may not be what it seems. The Metropolitan uninsured motorist section, as we read it, also includes underinsured coverage. Therefore, depending on the severity of their injuries and the respective limits of the applicable policies, the Longeneckers may fare equally well whether Baker is uninsured or insured.

Adding to the Longeneckers' equivocal posture is the likelihood that their right to recover from Metropolitan has already been established by the mere fact that State Farm and American Motorists denied coverage to Baker, regardless of the justification for their position.[3] *See St. Paul Mercury Insurance Co. v. American Arbitration Association*, 425 Pa. 548, 229 A.2d 858 (1967). This situation suggests an adverse interest between Metropolitan and the Longeneckers, and on that basis they may properly be listed as defendants.

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[3] The Longenecker's counsel requested arbitration in a letter to Metropolitan's counsel dated May 28, 1982. Apparently, however, nothing has occurred since that time.

If Baker is realigned as a plaintiff and the Longeneckers remain as defendants, diversity of jurisdiction will be destroyed. At oral argument, counsel for Metropolitan sought to resolve the problem by dismissing Baker since he has not filed an answer nor appeared by counsel. An appellate court may dismiss a nonadverse party if necessary to preserve diversity jurisdiction. *Ross v. International Brotherhood of Electrical Workers*, 634 F.2d 453, 456 (9th Cir. 1980).

The question remains, however, whether Baker is an indispensable party within the meaning of Fed. R. Civ. P. 19(b). If he is, he may not be dropped as a party to preserve jurisdiction. *See Publicker Industries v. Roman Ceramics*, 603 F.2d 1065, 1069 (3d Cir. 1969); 3 J. MOORE'S FEDERAL PRACTICE ¶19.03.01 at 19-53 (1982). At least superficially, the relationship between Baker and the defendant insurance companies would appear to require his presence in the litigation. Because the question of indispensability may require some fact finding and because of the ambiguous position of the Longeneckers, we conclude that the jurisdictional issue should first be addressed by the district court.

One additional matter should also be determined on remand—that is, whether Metropolitan has an actual dispute with the State Farm and American Motorist insurance companies at this time. If Metropolitan had paid the Longeneckers and became subrogated to their interests, the controversy would be a live one. Until Metropolitan has made a payment, however, there is some question whether it has only a potential and contingent obligation, and not a definite and concrete

dispute as will satisfy the case or controversy requirement. *Cf. ACandS, Inc. v. Aetna Casualty Co.*, 666 F.2d 819 (3d Cir. 1981). We do not pass upon the issue here.

Accordingly, this case will be remanded to the district court for further proceedings consistent with this opinion.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

Memorandum and Order Dated October 7, 1983.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania
Entered 10-7-83
Clerk of Court

Civil Action No. 81-2867.

METROPOLITAN PROPERTY & LIABILITY INSURANCE COMPANY,

vs.

EARL M. LONGENECKER, MARY JANE LONGENECKER, WILLIAM E. BAKER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY.

MEMORANDUM AND ORDER

BECHTLE, *J.* OCTOBER 7, 1983

This is a diversity action for declaratory judgment by Metropolitan Property and Liability Insurance Company which seeks to establish whether automobile liability insurance coverage was in effect for the driver of an automobile which collided with one operated by the insurance company's insureds, Earl and Mary Jane Longenecker. This Court previously granted summary judgment for the defendants based on an arbitration clause in the insurance contract between Metropolitan

and the Longeneckers. This Memorandum follows an appeal of that decision by Metropolitan and a remand of the case by the Third Circuit for further proceedings consistent with its opinion.

The case arises from an automobile collision which occurred on October 5, 1980, between a car driven by William Baker and one driven by Earl Longenecker. As a result of the accident both Earl Longenecker and his wife, Mary Jane Longenecker, sustained personal injuries.

The Longeneckers were insured by Metropolitan under a policy providing both uninsured and underinsured motorist coverage. The Metropolitan policy definition of an uninsured vehicle includes vehicles which have a policy in effect at the time of the accident but the carrier denies coverage. The Metropolitan policy also provides for arbitration of the uninsured motorist provision if there is a disagreement as to any person's right to collect damages under that provision or the amount of damages. Both State Farm Mutual Automobile Insurance Company and American Motorists Insurance Company have denied coverage on the automobile Baker was driving. State Farm is the insurer of Eugene Thomas, the owner of the vehicle driven by Baker. American Motorists is the insurer of Dale Sprenkle, the step-father of Baker with whom Baker resided as a minor at the time of the accident.

In bringing this diversity action, Metropolitan sought a declaration of its obligations under its own policy given the possible existence of coverage on behalf of Baker under either the State Farm or the American Motorists

policies. Metropolitan's complaint named Baker, the Longeneckers, State Farm and American Motorists as defendants. The three insurance companies are citizens of different states and Baker and the Longeneckers are citizens of Pennsylvania. Facially at least, the requirements of diversity were met. However, upon review of this Court's grant of summary judgment for defendants due to the arbitration clause, the Third Circuit indicated that a jurisdictionally defeating realignment of the parties might be warranted in view of their actual interests. Remand was ordered to resolve this issue and the resulting question of the indispensability of certain parties whose presence would defeat jurisdiction if a realignment occurred. In addition, this Court was directed to determine whether Metropolitan had actually made any payment to the Longeneckers so that it had become subrogated to their interests. If not, the existence of a definite and concrete dispute as would satisfy the Article III case or controversy requirement would be subject to doubt.

Initially, attention must be given to the case or controversy issue since Metropolitan admitted in a hearing held in open Court on September 27, 1983, that Metropolitan had made no payment to the Longeneckers. If there is no actual case or controversy, then the matter at hand is not justiciable and the Court has no power to grant declaratory relief. *Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270, 273 (1941). A justiciable controversy is to be distinguished from a dispute of a hypothetical or abstract character or one which is merely academic or moot. *ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 666 F.2d 819 (3d Cir. 1981). The difference is

necessarily one of degree. The basic question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having "adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co., supra,* 312 U.S. at 273.

Applying these principles to the facts at hand, this Court concludes that there is no case or controversy in existence between Metropolitan and the other two insurance companies, State Farm and American Motorists, at this time. Metropolitan has taken the position that as there is no doubt that it will have to pay the Longeneckers on their claim, there is no doubt that there *will be* an indemnification claim by Metropolitan against State Farm and American Motorists and this is sufficient for declaratory judgment purposes. The fact still exists, however, that to date no payment has been made to the Longeneckers by Metropolitan. Moreover, while the position of Metropolitan might have been persuasive if its payment to the Longeneckers were imminent, counsel for Metropolitan indicated at the September 27, 1983 hearing that the carrier is still in the stage of casual correspondence with its insured as to the amount of their damages. The liability dispute between Metropolitan and the Longeneckers has not even developed to the level of actual negotiation. As such, Metropolitan's future claim for indemnification from either State Farm or American Motorists or both is not of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Metropolitan's conceptual view of its right to demand a declaration of

its rights does not satisfy this Court's constitutional mandate to address itself to actual cases or controversies and not to ambiguous scenarios which are lurking in the background and which may someday mature into a real dispute. At present, Metropolitan's request for declaratory relief is premature. Accordingly, the case shall be dismissed as not justiciable.

An appropriate Order will be entered.

Appendix—Memorandum and Order Dated October 7, 1983.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 81-2867.

METROPOLITAN PROPERTY & LIABILITY INSURANCE COMPANY,

vs.

EARL M. LONGENECKER, MARY JANE LONGENECKER, WILLIAM E. BAKER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY.

ORDER

AND NOW, TO WIT, this 7th day of October, 1983, for the reasons stated in the foregoing Memorandum, IT IS ORDERED that the suit is *dismissed.*

LOUIS C. BECHTLE, *J.*

Memorandum Opinion of the Court Dated June 18, 1984.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 83-1819

METROPOLITAN PROPERTY & LIABILITY INSURANCE COMPANY,

Appellant.

v.

EARL M. LONGENECKER; MARY JANE LONGENECKER; WILLIAM E. BAKER; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY.

Appeal from the United States District Court for the Eastern District of Pennsylvania

(D.C. Civil No. 81-2867)

District Judge: Honorable Louis C. Bechtle

Argued June 11, 1984
Before: WEIS and BECKER, *Circuit Judges*, and OLIVER, *District Judge*.*

Filed June 18, 1984

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* The Honorable John W. Oliver, United States District Judge for the Western District of Missouri, sitting by designation.

Appendix—Memorandum Opinion of the Court Dated June 18, 1984.

MEMORANDUM OPINION OF THE COURT

WEIS, *Circuit Judge.*

This is the second time that plaintiff has taken an appeal to the court in this case. On the first occasion, we remanded to the district court for determinations on whether diversity jurisdiction is present and whether an actual dispute exists between plaintiff Metropolitan and the other two insurance companies, State Farm and American Motorists.

After further briefing and argument, the district court concluded there was no existing case or controversy, noting particularly that Metropolitan had not yet made any payment to its insureds, the Longeneckers. Indeed, the court said that Metropolitan is "still in the stage of casual correspondence with its insured as to the amount of their damages." The liability dispute between them "has not even developed to the level of actual negotiation." We note that the accident occurred on October 5, 1980, more than three years ago.

The district court concluded that Metropolitan's future claim for indemnification from State Farm or American Motorists was not of sufficient immediacy to warrant the issuance of a declaratory judgment. The court said, "Metropolitan's request for declaratory relief is premature." Accordingly, the case was dismissed.

As we pointed out in our first opinion, the Longenecker's counsel had requested arbitration on their uninsured and underinsured claim with Metropolitan in a letter dated May 28, 1982. Seemingly, nothing has been accomplished in that direction although more than two years have gone by. We noted also that it is possible

that the Longeneckers have no real interest in whether Baker was insured because their own policy may perhaps be adequate.

The grant of a declaratory judgment is a discretionary matter for the district court. 28 U.S.C. §2201; *see Interdynamics, Inc. v. Wolf*, 698 F.2d 157, 167 (3d Cir. 1982); *Exxon Corp. v. Federal Trade Commission*, 588 F.2d 895, 900 (3d Cir. 1978); *Bituminous Coal Operator's Assn. v. International Union, United Mine Workers*, 585 F.2d 586, 596 (3d Cir. 1978). Judge Bechtle referred to the "ambiguous scenarios which are lurking in the background and which may some day mature into a real dispute." His doubt as to the advisability of granting declaratory relief at this stage of the events is quite understandable.

In view of the circumstances in this case, which we have twice reviewed, we find no abuse of discretion in the district court's decision to withhold declaratory relief at this time.

Accordingly, the order of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

WEIS

Circuit Judge

American Motorists Insurance Company and State Farm Mutual Automobile Insurance Company's Memorandum of Law.

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IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Pennsylvania

METROPOLITAN PROPERTY & LIABILITY INSURANCE COMPANY,

vs.

EARL M. LONGENECKER, MARY JANE LONGENECKER, WILLIAM E. BAKER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY.

Civil Action No. 81-2867

AMERICAN MOTORISTS INSURANCE COMPANY AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S MEMORANDUM OF LAW

This action arises out of a vehicular accident wherein a vehicle driven by WILLIAM E. BAKER collided with a vehicle operated by EARL LONGENECKER. As a

result of the accident, EARL and his wife, MARY JANE, sustained personal injuries. METROPOLITAN PROPERTY & LIABILITY INSURANCE COMPANY (hereinafter "Metropolitan"), insured the vehicle driven by the LONGENECKERS and the METROPOLITAN policy provided uninsurance motorist coverage for the LONGENECKERS. The METROPOLITAN uninsured motorist section also includes underinsurance coverage.

WILLIAM E. BAKER has been formally denied coverage by both STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY (hereinafter "State Farm"), and AMERICAN MOTORISTS INSURANCE COMPANY (hereinafter "AMERICAN").

The respective parties' interest in the instant litigation is as follows:

METROPOLITAN, as the carrier for the LONGENECKERS, seeks to have coverage established for BAKER so that METROPOLITAN may escape its responsibility under its uninsured motorist coverage of the LONGENECKERS. Obviously, METROPOLITAN'S interest in establishing coverage with regard to Baker is adverse to STATE FARM and AMERICAN. In an effort to avoid personal liability, BAKER would, similarly, desire that coverage be established as to either STATE FARM or AMERICAN or both. Therefore, BAKER'S interest is identical to METROPOLITAN'S interest in the instant litigation and, consequently, it would appear that BAKER should be realigned as a Plaintiff.

Appendix—American Motorists Insurance Company and State Farm Mutual Automobile Insurance Company's Memorandum of Law.

The facts of this action are substantially identical to those found in *Mission Insurance Co. v. Mackey*, 340 F. Supp. 824 (W.D. Mo., 1971). This was a declaratory judgment action in which one of the individual Defendants made demand upon two (2) insurors to defend him in a negligence action brought against him in a State Court by other individual Defendants. The action was dismissed by the District Court for lack of diversity jurisdiction since it appeared that both insurors were seeking to prove the same fact, *viz.*, that the allegedly negligent Defendant did not have permission to operate his parents' automobile at the time of the accident in question. Likewise, in *Bonnell v. General Accident Fire & Life Assurance Company*, 167 F. Supp. 384 (N.D. Ca., 1958) the Plaintiff sued his insuror and a third party in a declaratory judgment action to test the validity of the insuror's denial of coverage. The third party had sued Plaintiff in State Court for damages and the insuror refused to defend the Plaintiff. The Court held that the interests of the Plaintiff and the third party were the same in that both were seeking to have the insuror's denial of coverage declared invalid. The Court therefore proceeded to realign the parties and dismiss the case for lack of diversity jurisdiction since both the Plaintiff and the third party Defendant were residents of California. Lastly, the LONGENECKERS' counsel concedes that the interests of his clients are identical with the Defendant insurors (See Exhibit "A").

The Defendants therefore respectfully submit that Defendant WILLIAM E. BAKER should be aligned as a Plaintiff and action dismissed for lack of diversity jurisdiction.

II. WILLIAM E. BAKER IS AN INDISPENSABLE PARTY IN THE PRESENT LITIGATION.

In the event of a realignment, this Court must consider whether BAKER is an indispensable party. Federal Rule of Civil Procedure 19(b) provides, in pertinent part, that the factors to be considered by the Court relative to the indispensable nature of a party include:

> (F)irst, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

Since BAKER and the LONGENECKERS are all residents of the Commonwealth of Pennsylvania, the realignment of parties will deprive this Court of jurisdiction over the subject matter as contemplated by Federal Rule of Civil Procedure 19(a). With regard to BAKER'S position in this action, the following facts are (or should be) undisputed:

1. BAKER'S interest is clearly adverse to that of the LONGENECKERS, STATE FARM and AMERICAN.

2. BAKER'S interest is identical to the interest of METROPOLITAN insofar as BAKER seeks coverage from STATE FARM and AMERICAN. However,

BAKER is seeking to eliminate the risk of personal liability while METROPOLITAN is seeking to avoid liability under its policy to the LONGENECKERS.

If BAKER is dismissed from the instant action, how can METROPOLITAN, *sua sponte*, assert BAKER'S purported rights against STATE FARM and AMERICAN? If BAKER were dismissed from the instant action and METROPOLITAN were to fail in its efforts to establish coverage for BAKER, would BAKER be precluded from asserting his rights in yet another action against STATE FARM and AMERICAN (especially considering that METROPOLITAN incurred some real liability on behalf of its insureds, the LONGENECKERS?) It is respectfully submitted that the answer to the first query is that, without BAKER, METROPOLITAN cannot seek to exercise BAKER'S alleged right to coverage. The answer to the second query is, simply, "no", and, therefore, STATE FARM and AMERICAN would be forced to litigate the identical issue before this Court *ab initio*.

Returning to the test as to whether BAKER is an indispensable party or not, it is evident that:

1. The dismissal of BAKER would be prejudicial to AMERICAN and STATE FARM in that BAKER would be able to re-litigate the identical issue involved in the instant action in the event that METROPOLITAN were unsuccessful in establishing coverage;

2. It is respectfully submitted that no protective provision, shaping of relief or other measures could alleviate the above-referenced prejudice;

3. It is doubtful that a judgment rendered by this Court will have any bearing on a potential Arbitration Hearing between the LONGENECKERS and METROPOLITAN and, further, an adverse judgment as to METROPOLITAN will be wholly inadequate if BAKER is dismissed as a party in view of BAKER's right to re-litigate; and

4. Lastly, and perhaps of the most practical import, the Plaintiff, METROPOLITAN will certainly have an adequate remedy if this action is dismissed for non-joinder since, once it incurs actual liability it may enforce its rights against BAKER and/or STATE FARM and AMERICAN in state Court.

Plaintiff places great reliance upon *Provident Tradesman Bank & Trust Co. v. Patterson*, 88 S. Ct. 733, 390 U.S. 102, 19 L. Ed. 2d 936 (1968), to support its contentions that WILLIAM BAKER is not an indispensable party to the present litigation. Defendants respectfully submit that the similarities between the two cases are superficial at best. The major distinction between the two cases lies in the fact that in *Provident* the Plaintiff had litigated the case to a verdict. The Supreme Court noted that:

> "Plaintiff's interest in preserving the fully litigated judgment should be overborne only by rather greater opposing considerations than would have been required at an earlier stage when their only concern would have been for a federal rather than a state forum".

In *Diamond Shamrock Corp. v. Lumbermens Mutual Casualty Co.*, 416 F. 2d 707 (C.A. 7, 1969), the Court emphasized the necessity of having all parties with an actual interest being before the Court stating (at p. 709),

> "... all parties who have an interest in or could be affected by the outcome of the declaratory judgment action here have been joined. *The distinction is critical.* (Emphasis supplied).

To proceed in the absence of WILLIAM BAKER as Plaintiff demands would be essentially a request for an advisory opinion inasmuch as MR. BAKER would not be bound by any ruling in which he was not a party.

Defendants therefore submit that WILLIAM BAKER is an indispensable party within the meaning of Federal Rule of Civil Procedure 19(b) and as such, should remain a party litigant.

III. THE PLAINTIFF HAS NO STANDING TO MAINTAIN A DECLARATORY JUDGMENT AGAINST THE DEFENDANT INSURORS AT THE PRESENT TIME.

There is no requirement that an insuror make an actual payment in order to secure a declaration of its rights under its policy. The Plaintiff insuror in this case is not however seeking a declaration of the rights and liabilities under the policy which it issued to the LONGENECKERS. It is seeking to have the Court declare that the disclaimers of coverage issued by STATE FARM and AMERICAN under their respective policies of insurance to be invalid. Very simply put, the

Plaintiff has no present or prospective interest in these policies and is therefore not in a position to claim that an adverse interest exists between itself and the two insuror Defendants.

Plaintiff advises the Court that "it is inevitable that (it) will have to pay money out of its insured. The contingency of payment to the LONGENECKERS is not at all remote".

This statement overlooks a vitally important consideration, *i.e.*, Plaintiff has brought this suit for the sole purpose of avoiding payment of uninsured motorist benefits to the LONGENECKERS. Plaintiff in fact freely admits in its most recent Brief that "A declaration of their (Defendant insurors) would, in effect, be a declaration of Plaintiff's non liability and vice-versa". (Plaintiff's Brief at p. 4).

Moreover, even if Plaintiff would recognize its obligations to make payment of uninsured motorist benefits and enter into a settlement agreement with the LONGENECKERS, it does not automatically follow that the Plaintiff would acquire a judicially cognizable interest in the policies of the Defendant insurors. In order to acquire such an interest it would have to be established the uninsured motorist policy limits in the METROPOLITAN policy were sufficient to fully compensate the LONGENECKERS for the injuries that they sustained as a result of the accident in question. See *Walls v. City of Pittsburgh*, 292 Pa. Super. 18, 436 A2d 698 (1981). *Shamey v. State Farm Mutual Automobile Insurance Co.*, 229 Pa. Super. 215, 331 A2d 498 (1974).

Appendix—American Motorists Insurance Company and State Farm Mutual Automobile Insurance Company's Memorandum of Law.

Defendants submit that there is no way for this Court to determine whether the Plaintiff will acquire an interest in the matter absent an actual uninsured motorist Arbitration Hearing, which is precisely what the LONGENECKERS have been attempting to secure from the outset of this litigation. The only alternative to such hearing would be for the Court to hold a full scale trial on the issues of liability and damages arising from the underlying automobile accident so that it can assess the likelihood of METROPOLITAN'S prospective subrogation rights. This hardly seems consonant with the principal of judicial economy which Plaintiff so fervently espouses.

The cases cited by Plaintiff in support of its argument that the present controversy is ripe for adjudication are readily distinguishable from the facts of the instant litigation. *Lumbermens Mutual Casualty Co. v. Borden Co.*, 241 F. Supp. 683 (S.D.N.Y. 1965), *Diamond Shamrock v. Lumbermens Mutual Casualty Co.*, 416 F2d 707 (C.A. 7, 1969). *A Cand S v. Aetna Casualty & Surety Co.*, 666 F2d 819 (C.A. 3, 1981), involved suits between insurors with mutual policyholders to determine which insuror had the primary obligation to indemnify and defend the policyholder in an existing lawsuit. In the case at bar, all three insurors have different policyholders and it cannot be fairly stated that the task before the Court is to determine which of the three policies is primary.

According to Plaintiff, the right of an insurer to be immune from claims under a policy of insurance is a "right" which the insurer may have declared under the

Declaratory Judgment Act, provided a valid "controversy" exists as to the insured's liability citing. *Maryland Casualty Co. v. Havens*, 24 F. Supp. 460, 461 (M.D. Pa. 1938). This general statement of law ignores the fact that the underlying controversy arises from an uninsured motorist action and that there does exist within the Plaintiff's policy of insurance a clause mandating that such disputes be resolved by Arbitration. Defendants submit that it is something more than a coincidence that the Third Circuit Opinion made reference to the case of *St. Paul Mercury Insurance Company v. American Arbitration Association*, 425 Pa. 548, 229 A2d 858 (1967). In this case, the insuror, as does the Plaintiff here, sought to avoid Arbitration under the uninsured motorist clause of its policy by contending that the alleged tortfeasor was not actually "uninsured" because his carrier had wrongfully denied coverage. The Court refused to enjoin the Arbitration stating (at p. 553), that:

> "To hold otherwise, would present a clear inconsistency and would prevent the prosecution of rights contracted for by the insured with the Plaintiff".

There is no practical difference between the procedure employed by the Plaintiff in the present action and the procedure which was proscribed in the *St. Paul* case. The Pennsylvania Courts have made it abundantly clear that they will not permit an insuror to escape its contractual obligations to arbitrate uninsured motorist claims. Cases which so hold include *Hartford Insurance Group v. Kessler*, 227 Pa. Super. 47, 324 A2d 521 (1974), *Gordon*

v. Keystone Insurance Co., 277 Pa. Super. 198, 419 A2d 730 (1980), *Wilbert v. Harleysville Mutual Insurance Co.*, 254 Pa. Super. 217, 385 A2d 987 (1978). *Allstate Insurance Co. v. McGonagle*, 449 Pa. 362, 296 A2d 738 (1972), to name but a few.

In conclusion, Defendants respectfully submit that until such time as the Plaintiff actually pays its policyholder it does not have an actual dispute with them so as to satisfy the case or controversy requirement.

IV. STATUS OF UNINSURED MOTORIST ARBITRATION.

It is conceded by all parties that the uninsured motorist Arbitration which the LONGENECKERS have been seeking for almost one (1) year will not decide the question of coverage which the Plaintiff has attempted to raise. Defendants contend however that this factor should be weighed in the context of the Plaintiff's contractual obligations to the LONGENECKERS, who have an absolute right to proceed with such a hearing. In *Nationwide Mutual Insurance Co. v. Megill*, 449 F. Supp. 1200 (E.D. Pa., 1978), it was held that an insuror could not utilize a declaratory judgment proceeding to avoid its obligation to arbitrate disputes arising from uninsured motorist claims. After an extensive review of case law on the subject, the Court stated (at p. 1203):

> "These cases rest, not upon the non-availability of a Declaratory Judgment as an alternative remedy, but upon the exclusion, by agreement of Court proceeding as a vehicle for the resolution of

> disputes. To permit a Declaratory Judgment proceeding would render the parties' agreement to Arbitrate disputes nugatory (citations omitted).

Moreover, as previously noted unless the Plaintiff actually makes a payment it does not have any interest in the coverage of either American Motorist or State Farm.

Plaintiffs complain however that an Order to proceed to Arbitration would be a waste of judicial economy such as would be frowned upon by the Supreme Court in *Provident Tradesman Bank, supra.* The argument is defective for several reasons. Uninsured motorist arbitration would not involve the Court and would afford the LONGENECKERS the benefits they had contracted for with the Plaintiff. Although an uninsured motorist hearing would not resolve the question of coverage, it should also be noted that the Declaratory Judgment requested by the Plaintiff would not resolve the issue of damages and a second proceeding will be necessary irrespective of this Court's determination.

The task of resolving all of the issues arising from this litigation is not nearly as gargantuan as Plaintiff would have the Court believe. The LONGENECKERS presently have a tort claim pending against MR. BAKER in State Court. No appearance has been entered by MR. BAKER in this action. The LONGENECKERS are free to enter judgment against MR. BAKER and proceed with an assessment of damages. They are

understandably reluctant to do so since there is a serious question as to MR. BAKER'S insurance coverage. Quite properly, they have advised Plaintiff of their desire to proceed under their uninsured motorist coverage. Were the Plaintiff to abandon its refusal to honor the LONGENECKERS' claim, it could perfect a default against MR. BAKER, assess damages and contest the disclaimers of AMERICAN MOTORIST and STATE FARM by garnishment. Such a procedure would undoubtedly be the most expeditious manner in which to proceed. It would guarantee prompt payment to the LONGENECKERS and guarantee that all issues are resolved in a single Court proceeding.

Appendix—American Motorists Insurance Company and State Farm Mutual Automobile Insurance Company's Memorandum of Law.

CONCLUSION:

1. The interests of the Plaintiff and WILLIAM BAKER are identical. The Court should therefore realign WILLIAM BAKER as a Plaintiff.

2. WILLIAM BAKER is an indispensable party to the present litigation.

3. The Plaintiff does not have an actual case or controversy with the Defendants AMERICAN MOTORISTS or STATE FARM.

4. The LONGENECKERS are entitled to proceed with uninsured motorist Arbitration immediately.

Respectfully submitted,

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American Motorist
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State Farm Mutual Automobile
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